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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES OTIS,

Defendant and Appellant.

B186836

(Los Angeles County  
Super. Ct. No. GA059192)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Fred J. Fujioka, Judge. Affirmed.

Michele A. Douglass, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney  
General, Pamela C. Hamanaka, Assistant Attorney General, Mary Sanchez and Steven D.  
Matthews, Deputy Attorneys General, for Plaintiff and Respondent.

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James Otis appeals from the judgment entered following his no contest plea to first degree residential robbery for which he was sentenced to the lower state prison term of three years. On appeal, he contends the trial court abused its discretion by denying him probation. We conclude the court did not abuse its discretion by sentencing him to state prison and affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

As recounted at the preliminary hearing, Tyeatha Washington agreed to meet Terrance Anderson in his hotel room after he solicited her for sex near a street corner. She arrived at the hotel room with Carrie Whited, who opened the door minutes later for Otis and a male confederate. When Anderson saw the men in the room, he became frightened and attempted to leave, but Otis blocked his path. Otis then grabbed Anderson's right wrist, pulled it behind Anderson's back and choked him before pushing him down on the bed. Anderson did not resist. As Otis restrained Anderson, his confederate searched Anderson's pockets and removed over \$5,000 in cash, which he gave to Otis. The confederate also took Anderson's wallet and his car keys.

Otis, Whited, and Washington<sup>1</sup> were each arrested and subsequently charged with first degree residential burglary and first degree residential robbery, with special allegations a person other than an accomplice was present during the burglary and the robbery was committed by defendants acting in concert (home invasion robbery).<sup>2</sup> Otis agreed to plead no contest to first degree residential robbery and in exchange, the court granted the People's motion to dismiss the acting in concert special allegation and the residential burglary charge. Otis entered the plea with the understanding he would be referred to the Department of Corrections for a 90-day diagnostic report pursuant to Penal

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<sup>1</sup> Codefendants Tyeatha Washington and Carrie Whited are not parties to this appeal.

<sup>2</sup> Penal Code sections 459, 667.5, subdivision (c), 211, 213, subdivision (a)(1)(A).

Code section 1203.03,<sup>3</sup> and, if probation were denied then his maximum potential state prison sentence would be the four-year middle term for first degree residential robbery.<sup>4</sup> A diagnostic report was ordered.

At the sentencing hearing the trial court announced it had read and considered the diagnostic report recommending Otis as a suitable candidate for probation. The court stated it had also reviewed the probation report and numerous letters on Otis's behalf attesting he was a loving father, good friend, and hard worker. The court heard from several family members who presented similarly supportive statements. Otis also spoke to the court. He expressed remorse for "what [had] happened" but felt he was not culpable and blamed his codefendants for the crime.

After argument from counsel the trial court decided against a grant of probation. The court found the mitigating factors of Otis's lack of a prior significant record and his strong family and community support were outweighed by aggravating factors of potential violence and demonstrated premeditation of the offense. The court determined although the seriousness of the crime justified the denial of probation, the mitigating factors warranted the imposition of the lower rather than the middle state prison term. Otis's request for probation was denied and he was sentenced to the lower term of three years in state prison.

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<sup>3</sup> Penal Code section 1203.03 provides in part: "(a) In any case in which a defendant is convicted of an offense punishable by imprisonment in the state prison, the court, if it concludes that a just disposition of the case requires such diagnosis and treatment services as can be provided at a diagnostic facility of the Department of Corrections, may order that defendant be placed temporarily in such facility for a period not to exceed 90 days, with the further provision in such order that the Director of the Department of Corrections report to the court his diagnosis and recommendations concerning the defendant within the 90-day period."

<sup>4</sup> Penal Code section 213, subdivision (a)(1)(B).

## **The Probation Report**

The preconviction probation report recommended probation be denied and Otis be sentenced to state prison. The report included Otis's prior record, which consisted of driving without a valid license, carrying a concealed weapon, trespassing, and fishing without a license, all misdemeanor offenses occurring between July 1998 and June 2000.<sup>5</sup> The report enumerated as aggravating factors: (1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness; (2) The planning, sophistication or professionalism with which the crime was carried out or other facts indicating premeditation; and (3) Otis's prior convictions as an adult or adjudications of commissions of crimes as a juvenile are numerous or of increasing seriousness. The report concluded there were no mitigating factors.

## **The Diagnostic Report**

The diagnostic report stated it "was prepared with the objective of assessing [Otis's] potential for functioning successfully on probation or under other supervision, and the level of threat to the community if he should fail to live up to that potential." The report indicated there was a difference in the recommendation of the two Department of Corrections (Department) evaluators assessing Otis, resulting in an Administrative review. The Department ultimately recommended Otis as a suitable candidate for formal probation, noting his denial of his culpability notwithstanding, Otis had been in custody for nearly one year, he had not used a weapon in committing the robbery, the victim had not been injured, and Otis had a minimal criminal record.

One of the Department's evaluators, D.F. Griott, a correctional counselor, opined although Otis denied his culpability, his subsequent lengthy incarceration as a result of this offense had made him aware of the consequences of committing such a serious

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<sup>5</sup> Vehicle Code section 12500, subdivision (a); Penal Code sections 12025, subdivision (a)(1), 555; Fish and Game Code section 7145.

offense. Griott also found it significant Otis's most recent contact with law enforcement prior to this offense had occurred more than four years earlier, and Otis currently had strong family support and specific plans for housing and employment if he were granted probation.

Another Department evaluator, T. Tennyson, a psychologist, observed Otis was defensive about his participation in the crime, insisting he did not conspire with codefendants to rob the victim, but merely happened upon acquaintances who were "playing their victim for money." Tennyson concluded if Otis had been minimally involved in the robbery as he claimed, then he would be a suitable candidate for probation. However, if Otis had agreed in advance to facilitate the robbery by restraining the victim, then his conduct would suggest the possibility of violence and recidivism, justifying Department commitment.

## DISCUSSION

Otis acknowledges the trial court has broad discretion to determine whether a defendant is suitable for probation and a decision denying probation will be reversed only upon a showing the trial court exercised its discretion in an arbitrary and capricious manner.<sup>6</sup> Otis contends, however, the trial court erred in its reliance on the aggravating factor of potential violence when it is not among the statutorily provided criteria relating to the crime in rule 4.414 of the California Rules of Court.<sup>7</sup> He also argues the

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<sup>6</sup> *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120; see *People v. Carmony* (2004) 33 Cal.4th 367, 376-377.

<sup>7</sup> Rule 4.414 of the California Rules of Court provides in pertinent part: "Criteria affecting the decision to grant or deny probation include: [¶] (a) Facts relating to the crime, including: [¶] (1) The nature, seriousness, and circumstances of the crime as compared to other instances of the same crime. [¶] (2) Whether the defendant was armed with or used a weapon. [¶] (3) The vulnerability of the victim. [¶] (4) Whether the defendant inflicted physical or emotional injury. [¶] (5) The degree of monetary loss

circumstances of this crime were not so heinous as to demonstrate potential violence, particularly when Otis merely restrained Anderson without threatening him with words or a weapon. As for the second aggravating factor, Otis concedes there was evidence of demonstrated premeditation, but he asserts this factor was outweighed by the mitigating factors found by the court.<sup>8</sup> We are not persuaded.

As to Otis's claim potential violence should not have been used as an aggravating factor, he has forfeited this purported defect by not making a timely objection at the sentencing hearing. Although the trial court is required to impose sentence in a lawful manner, counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing.<sup>9</sup> "“Routine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention.””<sup>10</sup> Accordingly, objections concerning the manner in which the trial court exercises its sentencing discretion and articulates or fails to articulate, its supporting reasons cannot be raised for the first time on appeal.<sup>11</sup> In any event, we conclude potential violence was properly considered by the trial court as an aspect of “the nature, seriousness, and circumstances of the crime as compared to other instances of the same crime” under rule 4.414(a)(1) of the California Rules of Court. We also agree with the People's argument Otis's conduct of

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to the victim. [¶] (6) Whether the defendant was an active or passive participant. [¶] (7) Whether the crime was committed because of an unusual circumstances, such as great provocation, which is unlikely to recur. [¶] (8) Whether the manner in which the crime was carried out demonstrated criminal sophistication or professionalism on the part of the defendant. [¶] (9) Whether the defendant took advantage of a position of trust or confidence to commit the crime.”

<sup>8</sup> Otis failed to obtain a certificate of probable cause. However, as the negotiated plea set a maximum potential sentence and did not limit Otis's ability to contest the court's sentencing discretion, the appeal is not a challenge to the validity of the plea and does not require a certificate of probable cause. (See *People v. Buttram* (2003) 30 Cal.4th 773, 777.)

<sup>9</sup> *People v. Davis* (1995) 10 Cal.4th 463, 551-552.

<sup>10</sup> *People v. Davis, supra*, 10 Cal.4th at page 552.

<sup>11</sup> *People v. Davis, supra*, 10 Cal.4th at page 552.

surprising and then strong-arming Anderson onto the bed to be searched by a confederate constituted more than minimal force and involved the threat of great bodily harm.<sup>12</sup> The record fully supports the trial court's assessment of the offense and its reliance upon potential violence as well as demonstrated premeditation as two aggravating factors.

Otis appears to suggest the trial court failed to consider or failed sufficiently to consider mitigating factors of his two minor dependents, absence of psychological problems, minimal drug history, lack of gang affiliation, and willingness to abide by probation conditions. However, these factors were assessed in the diagnostic report and most were argued by defense counsel at sentencing as justifying a grant of probation.<sup>13</sup> A trial court has no obligation to make an express statement of reasons as to why it deemed proffered mitigating factors nonexistent or insignificant. Unless the record affirmatively indicates to the contrary, a trial court is presumed to have considered all relevant criteria, including any mitigating factors.<sup>14</sup> The trial court's determination in this case was not "so irrational or arbitrary that no reasonable person could agree with it."<sup>15</sup>

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<sup>12</sup> Even if demonstrated premeditation were the only proper aggravating factor, a single aggravating factor may support the denial of probation. *People v. Robinson* (1992) 11 Cal.App.4th 609, 615, disapproved on another ground in *People v. Scott* (1994) 9 Cal.4th at page 353, footnote 16.

<sup>13</sup> It is true the trial court's decision to deny probation was at odds with the diagnostic report, but as Otis recognizes, the trial court was not obligated to follow the report's recommendation of probation. (See, e.g., *People v. Warner* (1978) 20 Cal.3d 678, 683; *People v. Downey* (2000) 82 Cal.App.4th 899, 910.) And, the court's findings echoed the conclusions of one of the two department evaluators, the examining psychologist.

<sup>14</sup> *People v. Holguin* (1989) 213 Cal.App.3d 1308, 1317.

<sup>15</sup> *People v. Carmony*, *supra*, 33 Cal.4th at page 377.

## **DISPOSITION**

The judgment is affirmed.

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JOHNSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.